When Legal Worlds Collide

When legal worlds collide: an exploration of what happens when EU free movement law meets UK immigration law

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Introduction

The central objective of this article is to explore the interactions between EU rules on the free movement of persons and the institutions and legal structures of UK immigration law. It does this primarily through the prism of the implementation of free movement law in the UK, but with a particular focus on the issues within free movement law that engage immigration related questions – i.e. first entry and residence, stability of residence and family reunion, leaving aside other questions about equal access to public goods. Even so, this is not an implementation study as such, but a broader reflection on how the national and EU legal orders interact. Methodologically, the article combines doctrinal legal analysis with data drawn from interviews with stakeholders in the national legal process, in order to provide a more fine grained interpretation of an area of law and legal practice which continues to be the source of tensions between the EU and the national level legal and institutional authorities. Away from the specific fields of law and policy under review, the broader objective is to suggest that such a combination method offers a useful approach to studying the relationship between EU law and national law in various fields across the Member States which offers greater insights into both legal and cultural interpretations of the tensions which exist than those which are commonly used. While the research that is presented here is based on a single state/single field case study, this approach could be fruitful for building rich interpretative comparisons showing how EU law interacts with national law across multiple sites of legal authority and fields of law, and not only where it is the implementation of Treaty rights and legislative measures such as directives which is in play. This question will be explored further in the conclusion. The paradox of the EU's multi-level legal order is that it demands that the EU and national legal orders be simultaneously both proximate and interlinked, and also in some respects separate. This paradox raises questions of legal doctrine and legal culture, where an approach combining doctrinal and empirical materials can offer the most useful insights.

An initial glance at the field of study suggests that there continue to be difficulties in relation to the application in the UK of the EU free movement rules in general (and the Citizens' Rights Directive (CRD)[1] in particular), even forty years after the UK's accession to the EU.

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Problems of implementation and interpretation are apparent to those who follow the work of the European Commission[2] and the European Parliament[3] when they are monitoring and guiding the domestic implementation of the EU rules, the work of the UK tribunals and courts in cases raising issues of EU citizenship and the rules governing the free movement of persons, and the commentaries in texts produced by academics, practitioners and organisations with advice or advocacy roles in this area. Studying these sources together reveals quite a number of problems. There have been conflicts between the interpretations given by the Court of Justice of the European Union (CJEU) and by some national courts; some recent determinations by tribunals and courts in the UK seem to give an impression that problems are emerging at the stage of decision-making on the part of the national administrative authorities such as the UK Border Agency (UKBA) and the Home Office;[4] several sets of infringement proceedings have been opened against the UK by the European Commission through the sending of a reasoned opinion, although they have yet to reach the stage of a procedure before the CJEU;[5] a substantial number of complaints are received by

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exceptionally supportive colleague and Advisory Board member), we are solely responsible for any remaining errors or infelicities of presentation.

1 Directive 2004/38/EC of the European Parliament and the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004 L158/77.

2 European Commission Report to the European Parliament and the Council on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States Brussels, 10 December 2008 COM(2008) 840 and European Commission Communication to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, 2 July 2009, COM(2009) 313.

3 European Parliament own initiative procedure and report on the EU Citizenship Report 2010: Dismantling the obstacles to EU citizens' rights (2011/2182 (INI)), led by the Committee on Petitions, A7-0047/2012, 6 March 2012 (approved by the Parliament in plenary on 29 March 2012).

4 Of the many examples, see *AB and MVC* v. *Home Office* [2012] EWHC 226 (QB), where the applicants waited altogether for 953 days for the third country national spouse of an EU citizen to be issued with a residence card; *GW (EEA reg 21: 'fundamental interests') Netherlands* [2009] UKAIT 50, where the Tribunal overturned a clearly political decision by the Home Secretary to seek the exclusion from the UK of the controversial Dutch politician Geert Wilders; and *JO (qualified person – hospital order – effect) Slovakia* [2012] UKUT 00237(IAC) where the UK authorities sought the deportation of a person detained in a mental hospital after a plea of not guilty by way of insanity was accepted by a court in criminal proceedings, on the grounds that this was exactly the same as a criminal conviction as the basis for a public policy grounded deportation.

5 The UK is by no means alone in being the subject of infringement proceedings: According to the Commission's Press Release 'Free movement: Determined Commission action has helped resolve 90% of open free movement cases', IP/11/981, 25 August 2011, infringement proceedings were launched (through the issuing of a reasoned opinion) against Austria, Cyprus, Czech Republic, Germany, Malta, Lithuania, Spain, Sweden, Poland and the United Kingdom over the period from March to June 2011. The free movement situation in Belgium has remained under analysis by the Commission. Three more sets of infringement proceedings were opened in the first half of 2012: against the Czech Republic and Lithuania: 'Free movement: Commission upholds EU citizens' rights', IP/12/75, 26 January 2012; against the UK: 'Free movement: Commission asks the UK to uphold EU citizens' rights', IP/12/417, 26 April 2012; and against Austria, Germany and Sweden: 'Free movement: Commission asks Austria, Germany and Sweden to uphold EU citizens' rights', IP/12/646, 21 June 2012. The Commission has also started separate proceedings against the UK in respect of the 'right to reside' test in the field of access to welfare benefits: Press Release, 'Social security coordination: Commission requests United Kingdom to end discrimination of EU nationals residing in the UK regarding their rights to specific

European institutions about the performance of the UK authorities in this area;[6] and there has been widespread criticism of the situation in the UK by many scholars and other commentators.

For some, the problem is best seen as a compliance gap,[7] especially visible if the focus is turned towards the efforts being made by the European Commission to pursue infringement proceedings against the UK (and other Member States) under Article 258 TFEU, although the UK Government continues vigorously to defend its corner and its interpretation of how the relevant rules should be implemented. For others, it appears more as a domestic interpretation gap, with the role of the courts and tribunals to be given particular attention, and especially the capacity of domestic courts to respond to the challenging legal environment created by a rapidly evolving case law emerging from the CJEU.[8] But these post hoc articulations tend to rely solely upon legal analysis and loose intuitions about how and why these legal interpretations are occurring (e.g. bald assertions that the UK Government does not *want* to comply with EU law which are not backed up with substantial evidence), and thus they have little useful to say about the socio-legal/cultural character of the encounter between the EU free movement rules and UK immigration law and about the broader implications of that encounter. This is a gap that the research underpinning this article has sought to fill, by combining legal analysis with empirical investigation into the perceptions and approaches of stakeholders in the implementation system in order to shine fresh light onto this particular problem and to bring out the rich narrative of how the two systems have interacted over time.[9] The focus in this article is not upon analysing the specific policy areas where there have been conflicts or differences of interpretation in relation to the effects of particular provisions of EU law,[10] but upon what might be regarded as a threshold criterion, namely the (legal) cultural aspects of the reception of EU law into the UK legal order – and specifically the encounter between EU free movement law and UK

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social benefits', IP/11/1118, 29 September 2011. At the pre-judicial stage, extensive information about the nature of the infringement alleged by the European Commission is not made public.

6 E.g. European Parliament Report A7-0047/2012, above n.3, at 18.

7 ECAS, *Mind the Gap: Towards a Better Enforcement of European Citizens' Rights of Free Movement*, December 2009; see also the Reports of the European Commission's Network of Experts on free movement of workers within the European Union available from http://ec.europa.eu/social/main.jsp?catId=475&langId=en.

8 E.g. A. Valcke, ' Five years of the Citizens Directive in the UK - Part 1', [2011] *Journal of Immigration, Asylum and Nationality Law* 217-244; A. Valcke, 'Five years of the Citizens Directive in the UK - Part 2', [2011] *Journal of Immigration, Asylum and Nationality Law* 331-357.

9 The primary source of the empirical data was a series of 35 interviews which were conducted with key stakeholders in the field of EU free movement law and UK immigration law throughout the UK and in Brussels. Interviewees included UK (i.e. English and Scottish) solicitors, barristers and advocates; former members of the Court of Justice of the European Union; UK Judges of the Upper Tribunal (Administrative Appeals Chamber) and of both tiers of the Immigration and Asylum Chamber; representatives of NGOs and think-tanks in the UK and in Brussels; officials within the European Commission and the European Free Trade Association Surveillance Authority. We were unable to secure any interviews with officials in the Home Office or the UKBA, and we were supplied with a series of written answers to our questions. In order to supplement our empirical data, we also had regard to media coverage of events related to the scope of EU free movement law and its intersection with UK immigration, and other public pronouncements of key informants (e.g. positions taken by the European Commission and the UK Government).

10 For a fuller presentation of these aspects of the research see J. Shaw, N. Miller and M. Fletcher, *Getting to Grips with EU Citizenship: understanding the friction between UK immigration law and EU free movement law*, Research Report, 2012, available from http://www.law.ed.ac.uk/overlap.

immigration law – and issues of system 'fit' between EU law and UK law. This is, in sum, a case study piece with wider ramifications for substantive and methodological issues.

As background to the limited focus of the article, it is essential to set out the most important elements of the background of EU and national law within which we ground the investigation. The following sections thus begin by setting out some background to the encounter between EU free movement rules and UK immigration law, and explain very briefly the legal/constitutional context in which it occurs, from the perspective of both national and EU law. We characterise these as legal worlds in collision. After showing how our research must combine theoretical insights from a number of different strands of thinking within legal scholarship and political science, we outline the approach taken in the wider research project that has underpinned this article. Selecting from this wider research base, we then go on to highlight how different actors would characterise the problems that they see stemming from the varied interactions of EU free movement law and UK immigration law, both as regards the specific problem of implementation and also as regards the broader phenomenon of the intersection of differing legal and constitutional systems. In the concluding section, we then reflect upon some of the wider ramifications of how EU free movement law and UK immigration interact at the present time.

The encounter between EU free movement rules and national immigration law

The development of the world of free movement

The EU free movement rules are fundamental rules of the EU legal system, based on Treaties which started by prioritising an integration process based on a single market and buttressed by a substantial body of secondary legislation detailing both the substantive rights and the procedural aspects whereby those rights are protected. Although the free movement rules themselves date back to the Treaty of Rome (EEC Treaty) which came into force on 1 January 1958, the cornerstone of the single market as a constitutional foundation for what we now call the European Union was put in place by the Single European Act of 1986. According to what is now Article 26 TFEU, 'the internal market shall comprise an area *without internal frontiers* in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of these Treaties' (emphasis added). Since that time, significant legal interventions have included the creation of a formal status of 'citizenship of the Union' by the Treaty of Maastricht in 1993 and the adoption of the Citizens' Rights Directive (CRD) in 2004. Finally, as from 2009 and the entry into force of the Treaty of Lisbon, the EU's Charter of Fundamental Rights (CFR) has been given a legal value which is equal to that of the Treaties, opening up new possibilities for legal claims under which the Charter comes to be seen as an autonomous source of rights protecting EU citizens and their families in free movement and immigration contexts.[11]

[11] The possibilities for applying the applying the fundamental rights enshrined in the CFR also to restrictions on freedom of movement under Article 21 TFEU, in cases where the CRD does not apply, were raised by the Opinion of AG Trstenjak in Case C-40/11 *Yoshikazu Iida* v. *Stadt Ulm*, 15 May 2012, but the judgment of the Court of 8 November 2012 took a more restrictive line and re-emphasised that the Charter cannot be used to broaden the scope of EU law and EU competences. *Iida* is the latest staging post in a citizenship case law in flux.

The progressive development of the EU free movement rules has thus seen a number of crucial shifts, but none are greater than the shift from a focus on (economically inspired) free movement rights for selected groups in the original EEC Treaty (workers, services, establishment) to a more holistic approach based on a (partially graduated) set of rights for EU citizens and their family members (with precise details often depending upon activity in the host state and economic status). The shift has in some ways been gradual – comprising incremental steps in legislation and case law of the Court of Justice building on the bolder step of instituting a concept of EU citizenship – but the biggest single step was probably the adoption of the CRD and its shift in both language and the scope of rights towards protecting citizens' rights *qua* citizens.[12] In addition, of course, the question of what rights accrue to EU citizens even when they do not exercise their free movement rights has come increasingly into focus. These shifts have not only impacted upon the internal rationale of EU law, suggesting a move from a focus on (economic) integration to a focus on a more constitutionalist perspective on citizenship,[13] but they have also intensified the challenges faced by Member States in the context of implementation and domestic adjustment to the demands of EU law and EU membership.

Free movement benefits only EU citizens and their families and not third country nationals except as family members.[14] Free movement is not unconditional and is hedged by conditions, which limit the level of solidarity that Member States must show amongst themselves. For example, EU citizens will retain the right of residence so long as they do not become an unreasonable burden on the host state social security system (Article 14 CRD). Despite the treaty basis of the original rights, EU law is still heavily dependent in the area of free movement upon implementation at the national level. Problems of implementation are especially evident here because one of the central legal instruments is a directive: the CRD must be implemented through legislative or quasi-legislative measures by the Member States. For a directive, the Member State must ensure that its measures achieve the objectives set out in the directive, although it enjoys a certain degree of discretion with respect to the methods it chooses for the purposes of achieving those objectives.

Furthermore different sorts of normative problems arise because 'static' EU citizens do not appear to enjoy the same range of rights as those who have exercised their free movement rights.[15] In a hybrid system such as the EU, with some federal elements and some elements

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12 The abbreviation CRD is one used primarily by academic scholars and other commentators and is not used by the European Commission, which refers generally to the directive on the free movement of EU citizens, abbreviated to Free Movement Directive or FMD in its documentation (perhaps responding to Member State sensitivities). None the less, the connection between this directive and the filling out of the concept of EU citizenship is worth making.

13 See J. Shaw, 'Citizenship: contrasting dynamics at the interface of integration and constitutionalism', in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law*, 2nd Edition, OUP, 2011, 575-609.

14 In Case C-40/11 *Yoshikazu Iida*, 8 November 2012, the Court of Justice once more reinforced that 'the Treaty provisions on citizenship of the Union do not confer any autonomous right on third-country nationals' (para. 66).

15 Here a confusing line of Court case law runs from *Rottmann* (Case C-135/08 *Rottmann* [2010] ECR I-1449) to *Dereci* (Case C-256/11 *Heiml, Kokollari, Maduike and Stevic*, 29 September 2011) via *Ruiz Zambrano* (Case C-34/09 *Ruiz Zambrano*, 8 March 2011) and *McCarthy* (Case C-434/09 *McCarthy*, 5 May 2011) and has increased levels of uncertainty about the scope of EU citizenship and its implications for national citizenship and immigration law: A. Wiesbrock, *Union Citizenship and the Redefinition of the "Internal Situations" Rule: The Implications of Zambrano*, 12 German Law Journal

drawn from international law, it is clear that concepts such as free movement for EU citizens and EU citizenship itself are inevitably going to be limited in a variety of different ways.[16]

EU law and the world of immigration control

A crucial dimension of the legal regime governing the free movement of persons has been that it has prevented the Member States from subjecting citizens of other Member States to ordinary immigration controls. Now it is clear that EU citizens and their families, regardless of nationality, have Treaty-based rights to enter, to remain and to work, study, take leisure, conduct whatever business they like or just live in other Member States, under the same conditions as nationals (albeit subject to certain conditions permitted by the Treaty and the secondary legislation). In any event, they cannot be treated as 'aliens' under national legal regimes. This was made clear to the UK back in the 1970s in the *Pieck* case. The Court held that

> 'the right of Community workers to enter the territory of a Member State which Community law confers may not be made subject to the issue of a clearance to this effect by the authorities of that Member State.'[17]

This stopped the UK border authorities from stamping 'given leave to enter the UK for 6 months' on the passport of every national of a Member State who entered the UK (even after the immigration authorities had ceased demanding pre-entry visas from this group).

Even so, some aspects of the immigration heritage have been retained: the main UK implementing measures are the *Immigration* (European Economic Area) Regulations 2006 (the 'EEA Regulations'; emphasis added).[18] In some places in the implementing rules, explicit reference is made back to the main legislative roots of UK immigration law namely the Immigration Act 1971 and the Immigration Rules which lay down detailed provisions.[19] The body charged with administrative decision-making in this area is the United Kingdom Border Agency (UKBA). Entry Clearance Officers embassies and consulates deal with applications for EEA Family Permits (i.e. substitutes for ordinary visas). And appeals against EEA decisions go

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2077-2094 (2011), *available at* http://www.germanlawjournal.com/index.php?pageID=11&artID=1400 and N. Cambien, 'Union Citizenship and Immigration: Rethinking the Classics?', (2012) 5 *European Journal of Legal Studies* 10-37.

16 N. Nic Shuibhne 'The Outer Limits of EU Citizenship: Displacing Economic Free Movement Rights', in C. Barnard and P. Odudu, *The Outer Limits of European Union Law*, Oxford: Hart Publishing, pp167-195.

17 Case 157/79 *R* v *Pieck* [1980] ECR 2179. See generally C. Vincenzi, 'European Citizenship and Free Movement Rights in the United Kingdom', [1995] *Public Law* 259-275.

18 SI 2006 No. 1003. These have been amended on a number of occasions, most recently in 2012: The Immigration (European Economic Area) (Amendment) Regulations 2012, SI 2012 No. 1547. The UK Regulations apply to EU citizens, citizens of EEA states, and citizens of Switzerland.

19 E.g. Regulation 22 of the EEA Regulations, which deals with the procedure in relation to EEA decisions in particular in relation to third country national family members. The constitutional roots of UK immigration law remain a matter of some controversy amongst legal scholars, and some still ascribe the basis of immigration law in a control sense – i.e. the power of the state to exclude or to include – to the prerogatives of the Crown. However, nowadays the legal basis is widely understood to be statutory in character (i.e. the Immigration Act 1971 and subsequent measures), plus the 'rules' provided for in s1(4) of the Immigration Act 1971, i.e. the Immigration Rules (http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/)

before the Immigration and Asylum Chamber (IAC) of the first tier (i.e. first instance) and Upper (i.e. appeal) Tribunals.[20] In other words, appeals are heard within the general statutory tribunal system that hears appeals against administrative decisions in the UK. There is no specialist administrative and judicial framework for EU free movement rules, and the presentation of the rules governing EU citizens and nationals of EEA states and of Switzerland either on the UKBA website[21] or especially in the EEA Regulations themselves (which are drafted in such a way as to be wholly inaccessible to the layperson) does not give an immediate or direct impression that such persons would be exercising EU Treaty rights not derived from UK law. There is no intrinsic difficulty with such an arrangement. The relevant EU measures do not tell the Member States what institutions they must establish to give effect to EU free movement rights and does not prohibit them from employing the same institutions which implement immigration law to deal with the implementation of EU law. Indeed in some instances under the CRD, Member States seem to be given specific permission to apply limited aspects of national immigration law, for example, in relation to admission of third country national members of the extended families of EU citizens (Article 3(2) CRD), although the precise scope of the relevant EU law provisions still remains uncertain.[22]

Against the backdrop of this set of overlapping institutions and legal frameworks, the relevant UK authorities, like those of the other Member States, have been charged with the challenge of dismantling the types of restrictions that were traditionally in place vis-à-vis non-nationals (visas, work permits and discriminatory access to the labour market, restrictions on access to social benefits, discriminatory treatment in the tax system, etc.) and also have been faced with a dramatic weakening of the discretionary capacity of states to exclude non-nationals deemed undesirable on public policy or security grounds. Gradually, the position of resident EU citizens has been strengthened under EU law, such that those with permanent residence (over five years: Article 16 CRD) and especially those who have been resident for over ten years enjoy rather substantial although not unconditional protection against removal (Article 28 CRD).[23] This step-by-step strengthening of EU rights and associated procedural guarantees has run counter to a trend in many states, driven partly by concerns about threats from outside conceived in terms of terrorism and political violence, but also by a more general politicization of the whole issue of 'immigration' especially under economic conditions of recession, increased unemployment and pressure on established welfare states, towards greater use of the power to deport persons deemed undesirable by the executive authorities including foreign national prisoners,[24] or to limit the possibilities for permanent settlement for migrants and their families.[25]

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20 For further information see http://www.justice.gov.uk/about/hmcts/tribunals.

21 http://www.ukba.homeoffice.gov.uk/eucitizens/.

22 The concept of 'facilitation' of the entry and residence of so-called 'other family members' under Article 3(2) CRD is under consideration in Case C-83/11 *SSHD* v. *Rahman*, a case referred by the UT(IAC), Opinion of AG Bot, 27 March 2012.

23 For the UK application see *LC* v. *Secretary of State for the Home Department (Learco Chindamo)*, IA/13107/2006, 17 August 2007. On the EU rules see Case C-145/09 *Land Baden-Württemberg* v. *Panagiotis Tsakouridis* [2010] ECR I-11979 and Case C-348/09 *PI*, 22 May 2012.

24 B. Anderson, M. Gibney and E. Paoletti, 'Citizenship, deportation and the boundaries of belonging', (2011) 15 *Citizenship Studies* 547-563.

25 In the light of trends in general immigration law to limit longer term rights of settlement (e.g. introducing higher income thresholds as in the UK – see http://www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/2012/march/43-changes-rules) it is

It is also worth mentioning that even for those states which are part of the Schengen zone and/or are subject to all the provisions of the TFEU on immigration and asylum – unlike the UK – the framework of free movement law does not just into a complete normative system which operates without reference to domestic implementation. Although the legal framework of the Schengen zone aims to establish a single visa regime and set of external border controls in respect of third country nationals, such as to enable the removal of internal border controls except in exceptional circumstances, the EU itself has by no means comprehensively displaced the Member States in this arena. This is true for the question of determining which (and how many) third country nationals may enter and settle, e.g. for the purposes of work or study, and even for the process of granting visit visas, where there are significant differences in approach amongst the Member States. Although a body of EU immigration and asylum law is emerging within the overall framework of Justice and Home Affairs law and policy, with significant effects in relation to the conditions of long term residence or rights of family reunification, it remains an incomplete framework. Even within EU law, therefore, the interactions between this new legal framework and the older system of free movement rights have given rise to legal uncertainty when it comes, for example, to figuring out which set of rules govern a particular case where the right to family life is put in question.[26] Where family reunification is at issue, in some cases it is EU law that applies (for both EU citizen and non-EU citizen family members) and in other cases it is national law; and in all cases the European Convention on Human Rights and Fundamental Freedoms (ECHR), with its Article 8 guarantee in relation to the protection of family life, operates as a type of backstop provision or minimum guarantee of legal protection.[27]

In sum, even 50+ years after the inception of the European Communities, the boundaries between the EU free movement rules, along with the obligations which these impose on the national legal and administrative systems by virtue of the constitutional framework of EU law, on the one hand, and the space where national authorities may legitimately exercise their immigration sovereignty (subject to the strictures of national, EU and international law, especially human rights law), on the other, continue to be sites of friction and tension between the respective legal systems. From a legal perspective, this should be seen as inevitable, because in a multilevel system such as the EU, where there are multiple and often competing sites of legal authority, a legal framework such as that which establishes the various rights of free movement can never offer a complete and closed normative system, which could operate without regard to other legal, constitutional and administrative reference points. The key issue remains how best to research it.

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interesting to see that Article 16 CRD and the right of permanent residence is a particular background in the context of EU free movement law (e.g. what periods of residence count? How do you count residence? etc): see Case C-162/09 *Lassal* [2010] ECR I-9217; Case C-325/09 *Dias*, 21 July 2011; Cases 424-5/10 *Ziolowski and Szeja*, 21 December 2011; Case C-529/11 *Akrape and Tijani*, pending.

[26] The challenges of the multiple normative systems governing family-based migration lie at the heart of an international project bringing together academics, NGOs and international organisations: http://familyreunification.eu/.

[27] For a first attempt to navigate these complex waters see A. Wiesbrock, 'The Right to Family Reunification of Third-Country Nationals under EU Law; Decision of 4 March 2010, Case C-578/08, *Rhimou Chakroun* v. *Minister van Buitenlandse Zaken*', (2010) 6 *European Constitutional Law Review* 462–480.

'Colliding legal worlds': the research challenge

These areas of friction – or 'colliding legal worlds' – occur where legal systems are operating side by side. Although this is well known in theory, most aspects of this collision have received surprisingly little academic attention. In many respects the intersection between the two systems remains a black box, particularly when it comes to 'street level' implementation questions. Although the little work that has been undertaken suggests that there is often a gap between 'formal' implementation and implementation in practice, in practice this has rarely been followed up through detailed empirical work.[28] In particular, there has been rather little research which seeks to explore the roles and perceptions of different participants in the implementation process at the national level,[29] including judges and legal professionals, as well as administrators and policy-makers, from the point of view of the specific implementation challenges which are raised by different types of instruments in the various fields and subfields of EU law.[30] In this section, we identify the main streams of existing literatures within legal scholarship and political science that need to be brought together for the purposes of assembling an effective response to the research gap identified.

For example, political scientists have devoted a good deal of effort to trying to ascertain why States do and do not comply with EU law, and to unpicking the different processes of 'Europeanisation' so that they can better explain and predict how states might behave in the future.[31] The concept of Europeanisation can be turned into a toolkit that can be used to classify the different ways in which Member States respond to their obligations under the EU Treaties. Distinctions between 'pace-setters', 'foot-draggers' and 'fence-sitters'[32] are commonly drawn. Alternatively, Claudio Radaelli has identified strategies of 'inertia, absorption, transformation, retrenchment' that mark Member States' reactions to the demands of implementation and compliance.[33] Much is made in that context of various hypotheses, such as whether there is a 'good fit' between the national and EU systems in relation to specific policy areas, which are said to make it easier to predict whether or not EU law will be effectively implemented and applied in any given Member State. The types of hypotheses articulated have included the relevance of legal culture and of the underlying

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28 E. Versluis, 'Even Rules, Uneven Practices: Opening the 'Black Box' of EU Law in Action' (2007) 30 *West European Politics* 50-67.

29 For a significant exception focused on case studies of employers, see C. Barnard, S. Deakin and R. Hobbs, 'Opting Out of the 48-Hour Week: Employer Necessity or Individual Choice? An Empirical Study of the Operation of Article 18(1)(b) of the Working Time Directive in the UK', (2003) 32 *Industrial Law Journal* 223-252.

30 A recent example of a collection of essays on compliance with EU law, written largely from the EU perspective is M. Cremona (ed.), *Compliance and the Enforcement of EU Law*, Oxford: Oxford University Press, 2012.

31 For a thorough review, including snapshots of various empirical studies measuring compliance (and seeking to explain it) in relation to 'law in the books' (i.e. rates of compliance with directives or similar measures), to CJEU case law, and to 'law in action' (i.e. street level of compliance), see L. Conant, 'Compliance and What EU Member States make of it', in Cremona, above n.30. See also E. Mastenbroek, 'EU Compliance: Still a Black Hole?', (2005) 12 *Journal of European Public Policy* 1103-1120.

32 T. Börzel, 'Pace setting, foot dragging, and fence sitting: Member State responses to Europeanisation' (2002) 40 *Journal of Common Market Studies* 193-214.

33 C. Radaelli, 'The Europeanization of Public Policy' in K. Featherstone and C. Radaelli (eds.), *Politics of Europeanization,* Oxford: Oxford University Press, 2003, 27-56 at 37-38.

'type' of legal or judicial system,[34] not to mention the character of public administration at the national level, as well as broader political factors such party political cleavages on European integration or public opinion on the benefits of membership of the EU. Scholars have also acknowledged that Europeanisation is not just about 'downloading' EU level requirements into the domestic context, but also about the extent to which national particularities can be 'uploaded' in such a way as to influence the EU level norms themselves. But explanatory hypotheses have often been shown to be unsound and unable to account for past actions or reliably to predict future positions on the part of either the Member States or the EU institutions, and so some political science analysis has resorted to a more interpretative approach which postulates different 'worlds of compliance' into which states can be broadly assigned according to the approaches they take to different groups of EU instruments or to different policy sectors.[35] While these 'worlds' can operate as good descriptive indicators, they do not necessarily account for the impact of both the textual and normative quality of legal instruments.

Only a small minority of works specifically take into account the type of backdrop that is significant in the case of the implementation of the principles governing the free movement of persons, namely that the framework of 'negative integration' (i.e. the principles which restrict Member State autonomy in relation to law making by reference to the Treaty guarantees of free movement) and the legal uncertainty which can be generated by a patchwork quilt of sources of EU law, including an evolving case law emanating from the CJEU, combined with the challenges of implementing complex and not always entirely clear EU level measures of the type which can be found in the area of the free movement of persons, such as the CRD.[36] In addition, some attention has been paid in political science to the technique of public interest litigation involving stakeholder litigants,[37] although this technique has been relatively little used in the field of EU free movement law, where most cases are brought by individual litigants,[38] albeit sometimes with stakeholder support to cover legal costs, in comparison to the field of environmental law.

Turning to the field of legal analysis, we find that most studies of the free movement of persons generally adopt one of two different approaches. There are works that have a primary focus upon the trajectory of EU-level legal development (where legal analysis is often driven by the question of whether and how EU citizenship is developing into a freestanding normative concept).[39] Such works rarely examine the national context in any

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[34] B. Steunenberg and D. Toshkov, 'Comparing transposition in 27 member states of the EU: the impact of discretion and legal fit', (2009) 16 *Journal of European Public Policy* 951-970.

[35] G. Falkner, M. Hartlapp and O. Treib, 'Worlds of compliance: Why leading approaches to European Union implementation are only 'sometimes-true theories' (2007) 46 *European Journal of Political Research* 395–416; G. Falkner and O. Treib, 'Three Worlds of Compliance or Four? The EU-15 Compared to New Member States' (2008) 46 *Journal of Common Market Studies* 293-313.

[36] S. Schmidt, 'Beyond Compliance: The Europeanization of the Member States through negative integration and legal uncertainty', (2008) 10 *Journal of Comparative Policy Analysis: Research and Practice* 299-308.

[37] R. Slepcevic, 'The judicial enforcement of EU law through national courts: possibilities and limits', (2009) 16 *Journal of European Public Policy* 378-394.

[38] For a rare exception see Case C-459/99 *Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (MRAX)* v *Belgian State* [2002] ECR I-6591.

[39] S. O'Leary, 'Developing an Ever Closer Union between the Peoples of Europe? A Reappraisal of the Case Law of the Court of Justice on the Free Movement of Persons and EU Citizenship', (2008) 27

detail,[40] or they treat the national significance of the evolution of EU free movement law or EU citizenship in a more generalized way.[41] There is a second body of work that focuses, from the (national) ground up, on the details of implementation in specific states or areas of law (e.g. family reunion, entry and residence, transitional regimes for new Member State citizens, access to work and welfare, etc.).[42] These are often written from a practitioner perspective, aiming to offer answers to specific legal problems rather than to provide new ways of understanding what has become – as this article will elaborate – an increasingly fraught relationship. In both cases, most analyses have been primarily within the frame of legal doctrine, articulating, explaining and where appropriate critiquing the scope of the legal rules and their application. Alongside, there is only a rather limited body of sociological and socio-legal work directly focusing upon how the EU free movement rules work in practice, but these works, for the most part, focus on the experiences of individuals and groups, rather than upon the cultural and institutional dimensions of how implementation works in practice.[43] However, an interesting legal cultural perspective is introduced by Agnieszka Kubal in her study of post-2004 Polish migration to the UK, which posits the different legal cultures of the home and host legal systems as important variables affecting

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Yearbook of European Law 167-193 (albeit before the recent cases such as *Ruiz Zambrano*); picking up on *Ruiz Zambrano* and *Rottmann*, see M. Hailbronner and S. Sanchez, 'The European Court of Justice and Citizenship of the European Union: New Developments Towards a Truly Fundamental Status', (2011) *Vienna Journal on International Constitutional Law* 498-537. See also M. Van den Brink, 'EU Citizenship and EU Fundamental Rights: Taking EU Citizenship Rights Seriously?', (2012) 39 *Legal Issues of Economic Integration* 273–290.

40 Curiously enough, this approach is also taken in the relevant chapter on EU free movement rules in one of the UK's standard textbooks on immigration and asylum law, which presents a straightforward description of the rules from the EU perspective, without considering the detailed national context. See G. Clayton, *Textbook on Immigration and Asylum Law*, 5th Edition, Oxford: Oxford University Press, 2012, Chapter 5. An exception is S. Carrera and A. Atger, *Implementation of Directive 2004/38 in the context of EU Enlargement: A proliferation of different forms of citizenship?*, CEPS Special Report, April 2009 (available from http://www.ceps.eu/books), but its focus is on the EU and its Member States as a whole, not just the UK.

41 Cambien, above n.15.

42 Some UK examples include: H. Toner, 'New Regulations implementing Directive 2004/38', [2006] *Journal of Immigration, Asylum and Nationality Law* 158-178; A. Hunter, 'Family members: an analysis of the implementation of the Citizens' Directive in UK law', [2007] *Journal of Immigration, Asylum and Nationality Law* 191; R. McKee, 'Regulating the directive? The AIT's interpretation of the family members provisions of the EEA Regulations', [2007] *Journal of Immigration, Asylum and Nationality Law* 334; N. Rollason, 'The entry and residence of EEA nationals in United Kingdom', [2007] *Journal of Immigration, Asylum and Nationality Law* 186; R. Scannell, 'The right of permanent residence', [2007] *Journal of Immigration, Asylum and Nationality Law* 201; H. Toner, 'Legislative Comment: New Regulations implementing Directive 2004/38', [2007] *Journal of Immigration, Asylum and Nationality Law* 158; A. O'Neill, 'Free Movement of EU Citizens within the EU', Paper given to a Matrix Chambers Seminar on EU law and immigration, http://eutopialaw.files.wordpress.com/2011/12/free-movement-of-eu-citizens-within-the-eu.docx.

43 E.g. L. Ackers and H. Stalford, *A Community for Children?: Children, Citizenship and Migration in the European Union*, Ashgate: Aldershot, 2004; HL Ackers and P. Dwyer, *Senior Citizenship? Retirement, Migration and Welfare in the European Union*. Bristol: Policy Press, 2002; S. Currie, 'De-Skilled and Devalued: The Labour Market Experience of Polish Migrants in the UK Following EU Enlargement', (2007) 23 *International Journal of Comparative Labour Law and Industrial Relations* 83; S. Currie, *Migration, Work and Citizenship in the Enlarged European Union*, Aldershot: Ashgate, 2008;

what she terms 'socio-legal integration', which includes migrants' responses to law and the legal environment in which they operate.[44]

There is also the constitutional meta-level to the intersection between EU free movement law and UK immigration law. In 1972, the UK Parliament passed the European Communities Act, creating the necessary constitutional 'gateway' to give effect to the many aspects of EU law that require national level adjustment. It is obvious that understanding such a novel situation (certainly for the UK) where an external source of law is given a superior status within the municipal legal system, albeit through the paradoxical means of an ordinary legislative act that appears to preserve the principle of parliamentary sovereignty, involves more than drawing up a checklist of cases where EU law is 'properly' applied and those where there are deficiencies, whether in terms of formal implementation or judicial interpretation. A number of meta-principles govern the formal relationships between the two systems in a multi-level constitutional structure, especially the principles of direct effect and supremacy.[45] Most of the scholarly focus, unsurprisingly, has gone either on the study of these principles in the case law context or on the theoretical issues raised by the incommensurability of the claims made by the EU and national legal orders, and on how to reconcile national constitutional systems with the demands of EU membership where it runs counter to core domestic constitutional principles. Issues of autonomy and sovereignty have thus received considerable theoretical attention,[46] as has the question of the legitimacy of the EU legal order.[47]

Less attention is paid to whether and how EU law penetrates the national systems of law and administration in ways that cannot readily be discerned by textual analysis alone, and which could have impacts both upon the implementation of EU law and, conceivably, on other aspects of national law as well, in particular via mechanisms that could be broadly described as aspects of 'legal culture'. As Ralf Michaels argues, legal culture is 'important in explaining and predicting the effect of law on society, such as in the extent to which promulgated laws will be adhered to and judgments will be implemented. Whether legal reform will be successful depends to some degree on legal culture.'[48] We can understand a state joining the EU as such a 'legal reform'. The immediate demands of accession to the European Union have always – from the time of the first enlargement involving the UK, Ireland and Denmark to the sixth wave of enlargement to bring Croatia into membership in 2013 – involved both national legislative and institutional adjustment, with the latter often involving an acknowledged training and acculturation dimension for both judges and officials. But soon after each enlargement has been completed, the broad assumption seems to have taken hold that the educational aspects of applying EU law in practice have been fully achieved once the adjustment of national legal education programmes to make EU law

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44 A. Kubal, 'Why semi-legal? Polish post-2004 EU enlargement migrants in the UK', [2009] *Journal of Immigration, Asylum and Nationality Law* 148-164; A. Kubal, *Socio-Legal Integration: Polish Post-2004 EU Enlargement Migrants in the United Kingdom*, Farnham: Ashgate, 2012.

45 See A. Nollkaemper, 'The Role of National Courts in Inducing Compliance with International and European Law – A Comparison', in Cremona above n.30, 157-194.

46 C. Richmond, 'Preserving the Identity Crisis: Autonomy, System and Sovereignty in European Law, (1997) 16 *Law and Philosophy* 377–420.

47 L. Azoulai, *The Force and Forms of European Legal Integration*, EUI Working Papers, LAW 2011/06.

48 See R. Michaels, 'Legal Culture', in J. Basedow *et al* (eds.), *The Max Planck Encyclopedia of European Private Law*, Oxford: Oxford University Press, 2012, 1059-1063 at 1060.

a compulsory element of every lawyer's training has been finalised and once updating modules to take into account new developments have been put in place for all to take advantage of. Beyond those steps, it seems largely taken for granted that comprehensive cultural change will occur naturally, and attention moves on to the next set of likely candidates for EU membership.

There is a challenge, therefore, to bring together these various dimensions of legal scholarship, along with the perspectives of Europeanisation or 'compliance studies' from the arena of political science, in order to build a framework for research which can go beyond the level of textual and doctrinal legal analysis, which can challenge taken for granted assumptions about how implementation and application of EU law ought to work in a 'mature' Member State such as the UK and which also recognizes the underlying theoretical as well as practical complexities that arise wherever legal worlds collide.

In response to this challenge, in addition to legal analysis, this article draws on insights from a series of interviews conducted with stakeholders in the implementation process (judges, legal practitioners, advice workers, NGOs, administrators) in order to isolate more precisely the character of the frictions which occur between UK law and EU law in relation to the application of the principles of free movement and the rights of EU citizenship and to explore some dimensions of those areas of friction. As a prelude to conducting these interviews, we engaged in an extended legal analysis of the implementation of EU free movement law in the UK to identify where problems of implementation or system dissonance continue to manifest themselves. In our full research report,[49] we suggested a fourfold typology as being a useful framework to help us to articulate the character and scope of the problem, enabling us to focus on (a) problems regarding residence rights for third country national family members, (b) the application of the right to reside test as a threshold criterion for welfare benefits, (c) the challenge of distinguishing between 'good' and 'bad' migrants for the purposes of determining issues such as deportation for public policy reasons, and (d) the particular challenges faced in relation to transitional regimes (e.g. new Member State citizens) and 'hybrid' regimes such as that which exists under the Turkish Association Agreement.[50] These insights helped us to structure a closer investigation into the character of the legal and institutional interaction between EU law and UK law. We used these insights as a baseline when exploring in depth with our interviewees how they saw the systems as fitting together, and their responses highlighted a wide range of issues of system misfit that they felt impacted upon effective implementation, including resourcing issues, training, decision-making and the operation of the administrative justice system more generally.

Focusing in this article largely on the threshold legal cultural questions of how the systems fit together from the perspective of the various stakeholders, we present evidence here of the strong perceptions articulated by many of our interviewees that there are indeed problems with the positions adopted by the UK administrative authorities and – to a lesser

[49] *Getting to grips*, above n.10.

[50] Space precludes a fuller description of these areas of friction. For more details see *Getting to grips*, above n.10. These issues map closely on to the areas where the European Commission has initiated infringement proceedings: see IP/11/1118 (use of right to reside test) and IP/12/417 (a range of issues including residence rights of family members) above n.5.

extent – by the UK tribunals and courts. However, we also found that there is widespread recognition that this is a complex area of law where the fit between the systems is never going to involve just a simple and satisfactory application of the constitutional principles governing the relationship between EU law and national law (seen from the EU perspective) and the European Communities Act 1972 (seen from the UK perspective). UK immigration law is widely seen by practitioners and advocacy groups as 'infecting' the application of EU free movement law, although this view is not shared by the UK Government. Different actors have therefore put forward arguments about the 'true meaning' of EU law, often in the absence of a clear and extended statement from the UK Government, and to some extent these arguments have filled a vacuum. The apparent intractability of these dissonant approaches and the increasingly adversarial relationships between those holding different positions lead in the concluding section, alongside a drawing together of the various strands of the article, to a reflection as to whether and under which conditions these colliding legal worlds could ever be reconciled.

In sum, this article undertakes the limited task of examining the extent to which the *culture* of EU free movement law is embedded in UK law. This is important as a threshold condition for the effective implementation of EU law in all cases, but especially so wherever claimants are seeking to rely upon the very 'edges' of free movement law or directly on rights derived from EU citizenship or from the CFR, rather than upon the terms of the CRD or its national implementing legislation. For these are the areas where EU free movement law most obviously and perhaps inevitably overlaps with UK immigration law, because of the need to step beyond the text of the EEA Regulations.

Free movement and immigration law: 'the war of the worlds'?

The views of the UKBA, presented to us in a written response, on the relationship between EU law and UK law are simple:[51]

> 'The UK takes its obligations under EU law seriously. We are confident that the Regulations correctly implement the Directive.'

More specifically, this response explained the particular character of the Regulations thus:

> 'Directive 2004/38/EC sets out the rights of EU citizens to move and reside freely within the Union, but often in broad terms. The Immigration (European Economic Area) Regulations 2006 need to be more specific to be in-keeping with UK legislation and to provide guidance to UKBA caseworkers responsible for implementing and applying the provisions of the Directive.'

While a detailed discussion of the areas where questions have been raised about UK compliance with EU free movement law lie beyond the scope of this article,[52] the picture that we derived from our interview data is that the two worlds do not co-exist entirely happily, although the position appears to be evolving as both domestic and EU institutions

[51] Information supplied in writing, 16 November 2011, held on file by authors. For further information on the UKBA response to the research see above n.9.

[52] See above our full report on the research, *Getting to grips with EU Citizenship*, n.10.

shift their positions. Through our interviews we attempted to tease out with stakeholders how they understand and then approach the challenge of domestic adjustment to EU law, depending upon the position which they had within the system (practitioners, advocacy groups, judges, administrators, etc.). The data we collected indicate how a set of apparently linear relationships can in fact give rise to some sort of collision – i.e. EU law is supposed to take effect in the UK and to take precedence in appropriate cases over UK law, but UK immigration law instead 'leaks' into EU free movement law when applied in the UK, thus endangering access to EU citizenship rights. Through the voices of our interview respondents, coupled with brief analysis of relevant contextual legal materials as required, this section shows just how complex the relationship between EU law and national law actually is, both in legal and constitutional 'theory' but also in matters of practice and implementation. Inevitably, rather than just describing the situation respondents also offered differing diagnoses regarding causes, effects and remedies, and these are also referred to here.

Adjusting to EU law

The case of EU free movement law shows that it should never be taken for granted that either the initial or the ongoing adjustment processes which occur when a state accedes to the EU or when it formally transposes a particular piece of EU legislation will effectively sideline for ever continued problems with the domestic implementation, interpretation and application of EU law. A concern shared by many interviewees was whether and how the two worlds of free movement law and immigration law could be made, effectively, to fit together. The perspectives offered by stakeholders involved criticisms not only of the UK institutions, but also of how EU law is evolving and of the role of EU institutions, especially the CJEU, in this area. EU law always seems to pose problems for decision-makers in the UK:

> 'it's difficult for a lot of lawyers and judges to get their head round how EU Law works because it is just so different to the domestic rules and so it's a completely different way of doing things. The starting points are different, so different.' [Q16][53]

A common concern amongst our practitioner respondents was that they felt that UKBA decision-makers and tribunal judges rarely drew a clear enough distinction between EU free movement law and UK immigration law. Asked about whether there are particular areas of friction between EU law and UK law, one practitioner replied:

> 'I think the thing which creates the biggest areas, because it's not confined to just one general heading, is the failure of UKBA, the tribunal service and the higher courts to recognise that free movement rights are not a system of immigration control. And that the starting place for the assessment of an individual case is entirely different.' [Q7]

In similar terms, another practitioner respondent noted that

[53] The codes for anonymised quotations from interviews are same as those used in our full report on the research, *Getting to grips with EU Citizenship*, above n.10.

> 'seeing EU Law as a border control issue is probably the problem, it's not just an alternative source of migration control. It's a source of civil entitlement based on a common pan European concept of citizenship and I think that's more than rhetoric.' [Q8]

The same respondent went on to highlight

> 'the extent to which the immigration authorities at almost all levels, including advisors, concentrate on the immigration problem rather than the free movement solution to the problem.' [Q9]

But is it straightforward to distinguish between the two systems? A closer look at the doctrine suggests that it might not be, and that only very sophisticated analysis can navigate through the complex challenges posed by these two interrelated legal orders. One reason is because the design of EU free movement law owes more to the immigration law traditions of other Member States than to that of the UK. Reference has already been made to the case of *Pieck*[54] (referred from the UK courts to the Court of Justice) where the Court held in 1981 that 'Community nationals' must be treated differently to 'ordinary' aliens and allowed to enter without 'leave'. The system of 'leave' at the point of entry has historically gone to the very heart of UK immigration law and the control of aliens, as Lord Hoffmann, delivering the majority judgment in *Remilien and Wolke* in 1998 in the (then) House of Lords,[55] has emphasised:

> '[The Immigration Act 1971] contemplates that persons who are not British citizens will be entitled to be present here only if they have been given leave to enter and that their right to reside in the United Kingdom will be a consequence of the terms of that leave. The whole scheme relies upon the exercise of control at the frontier and is part of the explanation for the insistence of the United Kingdom in retaining such controls… The immigration controls of most European countries with land frontiers operate in a different way. Under their systems, the primary question is whether the non-citizen has a legal right to be present in the country, reside there, be employed or follow an occupation. His right to enter is a consequence of his having the right to be there rather than the other way round.'

The relationship between rights, leave and control was developed more recently by Judge Rowland of the Administrative Appeals Chamber of the Upper Tribunal in a determination where he was wrestling with the problems of applying the 'right to reside test' as a threshold criterion for access to welfare benefits in the UK:

> 'Domestic immigration legislation does not expressly recognise the concept of a right of residence except in the 2006 Regulations [the EEA Regulations], which implement Directive 2004/38/EC. However, leave to enter or remain, granted under the Immigration Act 1971, amounts to recognition of a right of residence. Unfortunately, the immigration authorities regard decisions under the 1971 Act as being matters of

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54 See above n.17.

55 *Remilien* v. *Secretary of State for Social Security; Chief Adjudication Officer* v. *Wolke* [1998] 1 All ER 129; [1997] 1 WLR 1640.

> immigration "control", not applicable to most European Union citizens who are free to enter the United Kingdom under regulation 11 of the 2006 Regulations. They do not seem to appreciate that, since 2004 [when the right to reside test became applicable], it has been important for European Union citizens to have decisions that establish not merely a right to be present in the United Kingdom but also a right of residence and that decisions under the 1971 Act are not concerned only with lawful presence but also with lawful residence.'[56]

As Judge Rowlands has shown, the continued existence of a 'leave' system in the field of 'ordinary' immigration law has some sort of 'hangover' effect in respect of the practical implementation of free movement rights. The case he is describing is one where welfare law picks up a concept – in this case the 'right to reside' test – that actually has no heritage in UK immigration law, and then applies it in a different field. If UK immigration law has no heritage of telling incomers whether they have a 'right to reside' as opposed to 'leave to remain', it becomes hard for those applying welfare law to figure out whether satisfying various criteria regarding the legality of continued residence – whether in the domain of free movement or where UK immigration law applies – also means that a claimant has such a 'right'. To put it another way, the effect of the Court's ruling in *Pieck* was not simply to whisk away all scope for overlap and friction between the systems by dint of establishing the special and overriding character of the free movement regime. On the contrary, the dividing lines continue to need careful navigation, where there are uncertainties about the scope and correct interpretation of measures such as the CRD, and where claims lie at the edges or margins of the existing and recognized corpus of free movement law.

Uncertainties within EU law

At times, our interviewees concentrated upon the problems that can be found within the corpus of EU free movement law. For example, some respondents commented critically upon gaps in the CRD, feeling that these contributed to the absence of a clear body of law for claimants to rely upon. It is not a 'full code', as one informant commented [Q14]. One respondent offered a particularly telling reaction to the challenges of applying the CRD:

> 'Well I started off with 2004/38 thinking that it was a comprehensive statement but the more I looked at it the more it's sort of bits, it's some bits from existing Directives. Some codification. So it's part consolidation, part codification, but only at the precise facts of cases rather than the principles…. I'm trying to look at it as a single comprehensive code and it just doesn't work. And the court certainly doesn't treat it like that. They're saying "This is merely an embodiment of an existing principle that carries on anyway behind it".' [Q15]

Despite the challenges that it undoubtedly poses, some informants none the less felt that compared to the UK transposition of certain measures in asylum law, especially the

[56] RM [2010] UKUT 00238 (AAC) at para. 15.

Qualifications Directive,[57] the national implementation of the CRD was a model of clarity and simplicity.

Lack of familiarity with the EU treaties and the broader corpus of EU law and, the shifting nature of CJEU case law were also suggested by informants as reasons for uncertainty in national decision-making. The UKBA agreed with the perspective that the rapid developments and complexities in the CJEU case law and in other EU law matters posed a substantial challenge for UK decision-makers.[58] The response noted that

> 'the complexity and multiplicity of ... judgments [of the UK courts and the CJEU] can mean that it is difficult to maintain a steady state in European policy.'

In similar terms, practitioners – who until recently found that EU free movement-related issues were a relatively small part of their practice – have also encountered difficulties getting to grips with its complexities:

> 'It was an area which I ran away screaming from; if anybody asked me about it, I didn't really know about it. It actually came up very rarely in my work.' [Q39]

The apparent twists and turns of CJEU case law in recent years have placed huge strains on the system. This has been particularly evident as the CJEU has been repeatedly asked to examine the limits of EU citizenship in cases such as *Ruiz Zambrano*, *McCarthy* and *Dereci*[59] which have all addressed the circumstances in which EU citizenship might be relevant in cases where the Union citizen resides and has always resided in the state of which he or she is a citizen. The substance need not concern us here, but the CJEU's approach to reasoning has been found confusing by national courts. As one judge commented:

> 'It's difficult when you look at the Luxembourg court decisions. Why sometimes do they take a completely teleological approach and other times a different approach. I mean it's interesting in a recent judgment in *McCarthy*, they actually talk about the literal, the purposive and the teleological, actually talk about three different approaches.' [Q40]

The 'spirit' of free movement and the contested nature of the margins of EU law

The field of EU free movement law has gradually expanded over the years and this has posed challenges at the national level. For example, in *Metock*,[60] the CJEU made it clear that it was not permissible for Member States to require that third country national family members had been lawfully resident with their EU citizen spouse or other family member in another

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57 Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted OJ 2004 L304/12.

58 Information supplied in writing, 16 November 2011, held on file by authors. For further information on the UKBA response to the research see above n.9.

59 Case C- 34/09 *Ruiz Zambrano*, 8 March 2011; Case C-434/09 *McCarthy*, 5 May 2011; Case C-256/11 *Dereci, Heiml, Kokollari, Maduike and Stevic*, 29 September 2011. For commentary see the references cited at n.15 above.

60 Case C-127/08 *Metock* [2008] ECR I-6241.

Member State before moving to the host state (in that case Ireland). This had been the interpretation given not only by Ireland, but also by the UK and a number of other Member States such as Denmark when implementing the CRD, relying on earlier CJEU cases such as *Akrich.*[61] In *Metock*, interpreting the provisions of the CRD rather than those of an earlier Regulation which was at issue in *Akrich*, the Court chose to overturn its earlier apparently sympathetic approach to the discretionary powers of the Member States when it was faced with a set of questions referred to it from the Irish courts, all of them involving cases where EU citizen wives were resident as non-nationals in Ireland with their spouses. Most of the group of claimants had actually met and married their partners in Ireland and none of the cases had the couples previously resided in another Member State.

But even after *Metock*, the UK Government was reluctant to accept that a person's previous immigration history would not be central to the question of resolving whether or not they could come within the protective scope of EU law through the family member provisions, harking back to the CJEU's now abandoned approach in *Akrich*. Thus it made an unsuccessful attempt to persuade its fellow Member States to adopt a more restrictive approach to free movement generally, including a wider interpretation of what constitutes an 'abuse' of free movement rights. This took the form of a proposal for a set of Council conclusions presented in November 2008.[62] The UK's suggested conclusions were eventually watered down into an anodyne text adopted by the Council.[63] This text omitted some key words from the UK's original proposal, in particular the view that '*only those exercising their rights in the spirit of the Treaty should benefit from freedom of movement*' (emphasis added).[64] Now the idea of the 'spirit' of free movement is bound to be a contested and protean one. It was invoked by Advocate General Tizzano, for example, in the *Chen* case, where he argued that in order to ascertain whether there is an 'abuse' it is important to determine 'whether the person concerned, by invoking the Community provision which grants the right in question, is betraying its spirit and scope.'[65] It is perhaps from this source that the UK drew its inspiration when preparing the draft Council Conclusions. But clearly the concept of the 'spirit' of free movement was not given the same content by all the various stakeholders in the process.

Thus the appropriateness of such ideas about 'abuse' and their applicability in the context of EU law was contested by many of our interviewees, especially the practitioners and advocacy group representatives. According to one practitioner:

> 'If the judge is inclined ... to hold someone's bad immigration history against them then they will be wanting to use those categories, that type of reasoning, even in a free movement case when it's not appropriate. It's not all judges by any means but there is [sic] a significant number of judges who will be inclined to refuse appeals. You find that in EU law just as strongly as you find it in immigration law.' [Q21]

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61 Case C-109/01 *Akrich* [2003] ECR I-9607.

62 See Council of the European Union, Note from the UK Delegation, Free movement of persons: abuses and substantive problems - Draft Council Conclusions, Doc. 15903/08, 18 November 2008.

63 Council Press Release, 16325/1/08 REV 1 (Presse 344), Justice and Home Affairs Council meeting, 27 and 28 November 2008 at 27.

64 See Draft Council Conclusions, above n.62 at 3.

65 Case C-200/02 *Zhu and Chen* [2004] ECR I-9925 at 9947, para. 114. We are very grateful to Niamh Nic Shuibhne for drawing this to our attention.

Many respondents did express a more general concern that at the margins of free movement law, the areas where there is always going to be some contention about the precise meaning of the law and how it should be interpreted,[66] there is a rather restrictive approach and spirit in the UK, shared not only by the UKBA in respect of its decisional role, but also by some parts of the judiciary. So one practitioner respondent commented:

> 'There's a tension between a genuinely more restrictive view of what freedom of movement rights entail at the margins which is common not just to the Home Office or UKBA but to much of the domestic judiciary as well.' [Q10]

This was echoed by a member of the judiciary offering a much broader perspective on the continuing 'struggle' with EU law:

> 'The pinch points are those interactions, they are those junctures... [M]ost cases ... get dealt with very straightforwardly, I don't know what the percentages are but it will be a high percentage of people who applied for an EU8 residence card, family member otherwise, they get granted, they apply from overseas for the family permit, they get granted. It's the minority ones where there's these questions about what is dependency, what is abuse ... whether there are conflicting rights, what's been met. Where the Home Office struggles in its decision-making and judges struggle in their decision-making and representatives struggle in presenting arguments, because at those points you're suddenly having to look at more general issues throughout the corpus of European Law. [Q11]

Decision-makers undoubtedly feel on safest ground when applying the EEA Regulations, and are less comfortable applying the Treaty itself, or the CFR. As one practitioner put it:

> 'There's a slight fetish made out of the immigration and European Economic Area Regulations, that if it's not in them, it's not the law. In practical terms, of course it's true that you start with your transposing domestic instrument and see if you can accommodate the EU right of movement interpretation within their provisions there. But if you can't, and self-evidently all of these things which are not transposing the freedom of movement directive, these are obviously not going to be in the regulations, then it becomes very difficult, not just in terms of law but how you give effect to the appeal of what's allowed in an immigration jurisdiction where there is no obvious way.' [Q12].

As another respondent put it, 'it's the Treaty they [referring to the UKBA] don't recognise'. [Q13]. The point is well illustrated by the treatment of the legal issues in the case of in *M (Ivory Coast)*,[67] where the Upper Tribunal concluded that the case was analogous to the earlier CJEU case of *Chen*, such as the third country national carer parent of a dependent,

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[66] Other examples, beyond *Metock*, of the CJEU interpreting the scope of EU law in ways that have challenged the UK decision-makers and courts include Case C-60/00 *Carpenter* [2002] ECR I-6279, Case C-34/09 *Ruiz Zambrano*, 8 March 2011 and Case C-200/02 *Zhu and Chen* [2004] ECR I-9925.

[67] *M (Ivory Coast)* [2010] UKUT 227 (IAC).

but self-sufficient, EU citizen must be allowed to reside in the UK.[68] The problem at the level of the Upper Tribunal was that there was no statutory mechanism to be applied to give the applicant a document enabling her to board a flight in Ivory Coast and to enter the UK, in the absence of proper implementation of *Chen*. Hence the judges had to be creative in issuing directions to the UKBA that it should make provision for the appellant to receive a document which would be sufficient to allow her to travel to the UK.

This legal *lacuna* has since been filled by an amendment to the EEA Regulations in 2012, but in a manner that is quite likely to be found wanting under EU law, because it denies the '*Chen* parent' access to a route which can lead to the right of permanent residence.[69] Showing how the idea of 'spirit' can come full circle, this same concept has been invoked in a commentary that is critical of the UK Government approach taken in the 2012 amendments, that seek to implement a number of case law developments emanating from the CJEU. Adam Weiss, of the AIRE Centre, points out that

> 'The UK authorities' response [to such CJEU cases] was to grant rights only to people whose lives track the facts of these cases as closely as possible, and not to anyone else. This conservative approach undermines the *spirit* of what EU law requires: a flexible approach to recognising the residence rights of EU migrants in unexpected situations where EU-law citizenship and free-movement rights are engaged. Giving the authorities broader discretion would have been better' (emphasis added).[70]

The shadow cast by immigration law

There was a widespread view amongst practitioner respondents that the general tightening up of immigration law has had an impact upon the practice of EU free movement law in the UK. As one respondent put it

> 'The other thing that has happened is the immigration rules have become increasingly inflexible and increasingly constrictive as to what the criteria for qualification are.' [Q17]

Anecdotal evidence supplied by practitioner respondents indicated that this could be a problem for EU citizens with third country national partners or spouses who were unaware they had EU rights, with UKBA practices as reported to us providing no evidence of a proactive attempt to select out EEA cases for appropriate treatment under the EU rules:

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68 Case C-200/02 *Zhu and Chen* [2004] ECR I-9925.

69 The Immigration (European Economic Area) (Amendment) Regulations 2012, SI 2012 No. 1547; the Regulations introduce a 'derivative residence card'. The new Regulation 15A was subsequently amended itself by Regulations taking effect in November 2012 in order to give effect to the judgment: The Immigration (European Economic Area) (Amendment) (No. 2) Regulations 2012, SI 2012 No. 2560. For a critical comment on the narrowness of the approach taken by the UK Government, see E. Mynott, '*Zambrano* Judgment Finally Incorporated into Immigration (EEA) Regulations', *Latitude Law*, http://www.latitudelaw.com/news/europe/zambrano-update-oct-12/, 26 October 2012.

70 A. Weiss, 'EEA Nationals and their rights - The new Changes to the Immigration Regulations 2006', *Migration Pulse*, 1 August 2012, http://www.migrantsrights.org.uk/migration-pulse/2012/eea-nationals-and-their-rights-new-changes-immigration-regulations-2006.

> ‘The other situation is, both for the individual who doesn’t know that they’ve got EU rights, the [TCN] who’s in a durable relationship with a [non-national EU citizen] woman, they will just turn up on the door and arrest them even although the [EU citizen] is in bed with him when they arrived. There is no issue about “does this person have a right?” rather than “has this person proved that they have a right?” Because of the immigration system, the whole onus is on the individual to make out their claim rather than it being for the immigration authorities to enquire to how long the couple have been living together and what the nature of their relationship is before detaining the Indian guy because obviously he might be in a durable relationship but their first reaction is “let’s detain him and if he’s in a durable relationship then presumably he can make an application”.’ [Q20]

Likewise, what first tier judges take for granted in immigration cases seems to have an impact in the area of free movement. One respondent pointed out the problems that arise:

> ‘when you insert EU Law through … national implementing measures and you give those to immigration judges … who are used to saying “The [Immigration] rules are god”. They are used to looking it up in the rules and applying the rules because that’s what they do, you know, that’s what they’ve been doing since time immemorial and that’s what they do and literally there is a jurisdiction which says they’ve got to be in accordance with the law, they hardly ever remind themselves or are reminded of Section 2 of the European Communities Act which says if the rules aren’t up to it, chuck them out the window mate… It’s a mindset and thing and it puts a premium on the regulations.’ [Q19].

Some practitioners have grown sanguine about what to expect from the first tier tribunal:

> ‘Well first tier cases of immigration can resemble a sort of Western sometimes, somebody comes in the saloon and shoots from the hip, yes, you don’t really know who’s going to come into town. There is a bit more consistency over the years. The standard has risen in the immigration tribunals from when they were adjudicators. I think, there’s more consistency in the upper tribunal immigration and asylum chamber .... I know certainly they’ve come on enormously but they were always quite good at certain things but certainly they’ve developed consistency and a standard which I think is better than it was, you know certainly a demanding environment as an advocate.’ [Q26]

Two particular issues that were picked out by respondents who wanted to highlight what they felt to be a negative impact of UK immigration law upon the practice of decision-making in the field of EU free movement law were the dimensions of ‘mindset’ and ‘seepage’/’leakage’. First, reflecting perhaps an increasingly adversarial relationship between some practitioners and the national authorities, one respondent inclined to a very negative perspective on how the complexity of immigration law intertwined with what s/he saw as a negative mindset in decision-makers:

> ‘I think it is fast-changing, it is complex. If there was [sic] a willingness to be a fair decision-maker, then it would have less of an effect that it is complex and fast

> moving because the legal representatives could explain the nub of the issue and could say "as you'll see in such and such a case the position is now this." Because you have complexity plus the ingrained suspicion plus the inclination to refuse applications which must be impacted on by the broader hostility to immigration then that's what you get the situation, you've got a perfect storm.' [Q18]

Another practitioner respondent reported similar problems in tribunal cases concerned with relationships between migrant EU citizens resident in the UK and non-EU citizens, and the rights of residence of the latter group in the UK:

> 'So you'll make your submissions and then you come out and [the judges have] rejected them for some credibility issue or something and the incredibility really is a mindset that they've got into from looking at the asylum appeals or from looking at some immigration cases where there's dodgy documents coming in from a country where they do need to test the credibility of the relationship.' [Q23]

Second, it was significant that some practitioner respondents felt that there was a degree of 'seepage' or 'leakage' between the two systems of UK immigration law and EU free movement law through the importation of immigration case reasoning into EU free movement cases by decision-makers and sometimes judges, with the result that tests or standards which were incorrect or inappropriate were applied where they should not be. One general concern which was expressed in a number of cases was a willingness to take into account a claimant's poor immigration history, which in free movement cases cannot be used as the basis for exercising a discretion to refuse an application, but rather can only be relevant to an enquiry into the facts (e.g. does the claimant not enjoy the claimed family life with the EU citizen which s/he claims?). A poor immigration history, a lack of 'credibility' (which is highly relevant in asylum decision-making) or indeed a generalised suspicion about the likelihood that one particular Member State's documents are more often the subject of forgeries, are issues which have to be carefully handled when it comes to the free movement and rights of residence of EU citizens.[71]

Some suggested there was a similar 'seepage' from the UKBA to the judiciary:

> 'What's disheartening is when you suspect some judges are not approaching things with an open mind. I talked about a seepage before, in the same way there's a bit of seepage of disbelief from asylum into immigration. I think there's also a seepage of the culture of disbelief from the Border Agency into sections of the decision making in the tribunal. I don't think it's anything like as strong but it is there. You find it also

[71] See for example the negative publicity that Aer Lingus received when it insensitively applied a language test to a Greek passenger travelling with her family from Spain to Cork, where she was resident: see 'A test just for Greek passengers', *Athens News*, 16 March 2012, http://www.athensnews.gr/issue/13487/54165. Some press reports indicated that Aer Lingus had stated that 'it had been enacting a directive from the United Kingdom Border Agency issued in early 2011 that warned airlines about the increasing use of forged Greek passports by illegal immigrants in Spain and Portugal. The airline said the British agency supplied the tests, which asked a wide range of questions, including requests to sketch a ladder and a triangle', see 'Greek 'language test' protester wins free flights', *Ekathimerini*, 18 March 2012, http://www.ekathimerini.com/4Dcgi/4dcgi/_w_articles_wsite1_1_18/03/2012_433460.

> in EU cases. That's why I talked about questions of resistance; if a judge is inclined to decide in a certain way, they will be resistant to drawing conclusions which seem obvious from the evidence, or they will be resistant to accepting a legal decision is binding if they don't want to implement it. That may be wrong in law, it may be possible to appeal them if you ever get to a higher court, but it is a factor in the first tier tribunal.' [Q22]

This suggests that the approach to the abuse and fraud issues covered by the CRD and implemented into UK law owes more to experience with credibility issues in other areas of immigration or asylum law, than it does to the specific criteria applicable in EU law and the particular approach to basing decisions on facts demanded by EU law. For one practitioner, some members of the judiciary seem to have a 'mindset' that makes it hard to separate out EU cases from immigration cases:

> 'And so again you were finding these decisions being made where I think there's just a sense that they can't separate out the European cases from other cases. Maybe it's just the mindset in which they're always used to working. I don't know if it's that or if maybe there's a feeling that they're not harsh enough because they're used to harsher rules. I don't know if that's behind some of the decisions.' [Q24]

Judges have also recognised this phenomenon:

> '[it would be] some of the restrictive approaches within domestic immigration law, whether their sort of cold hand applies when it comes to looking at EU law and I think I wouldn't rule out that has happened. You know I've seen immigration judge decisions dealing with for example things like the durable relationship category which I almost think is a sort of hangover from some approach to the primary purpose rule under immigration law twenty years ago.' [Q25]

On the other hand, a selection of examples drawn from the recent case law of the IAC (UT) provides a reassuring counterpoint to these reflections. Recent evidence dealing with issues such as permanent residence or the rules on family relationships highlight the Upper Tribunal's awareness of the role of EU law in these types of borderline cases. In *Idezuna* (*EEA – permanent residence*) *Nigeria*,[72] the Upper Tribunal's determination made it clear that what the decision-maker needs to focus on is the question whether, first, the applicant had achieved the necessary five years of residence in the UK as the family member of an EEA citizen (including time before the CRD was passed or came into force[73]), without absences exceeding those permitted by the CRD, and whether, second, the period which elapsed since that five year point had been achieved had itself not contained absences, which would mean that the previously acquired right of permanent of residence would lapse. In this case, the answers were respectively 'yes' and 'no', meaning that the UKBA should have issued the requested residence card and the judge in the First Tier Tribunal had erred in law in his approach. The problem arose in this case because the UKBA and the First Tier Tribunal both insisted on focusing on extraneous issues around the marriage and the marriage breakdown, plus the later conduct of the EEA citizen, which were irrelevant to the question whether the

[72] [2011] UKUT 00474 (IAC).

[73] Case C-162/09 *Lassal* [2010] ECR I-9217.

applicant had acquired a right of permanent residence. This comes from the way in which the UK system tends to construct the applicant's case as an application for a particular status judged by reference to the conduct of the applicant (and his former spouse) on the date of application, rather than a process of recognising whether or not a right has been acquired and not subsequently lost (by reference to facts right up to the present day), and thus whether the relevant confirmatory paperwork should be issued.

In like manner, the Upper Tribunal (IAC) dealt briskly with the failings of an Entry Clearance Officer who was too keen to apply what amounted to the rules on marriages of convenience drawn from 'ordinary' immigration law to the case of a TCN spouse of an EEA citizen in *Papajorgji*.[74] While accepting that the Article 35 CRD allows Member States to adopt the necessary measures to deal with issues of fraud and abuse, including treating marriages of convenience as such, the Tribunal insisted that there must be some evidence of abuse for the UKBA to raise before the applicant would be expected to show that his/her marriage was *not* one of convenience. The particular issue in *Papajorgji* was the failure on the part of the applicant to provide evidence of family life (e.g. family photographs) being held against her by the Entry Clearance Officer, when she had not in fact been asked for this material in the first place. In any event, the Tribunal was at pains to show that routinely requiring such material in an EEA case was not the right way forward, commenting negatively that:

> 'The impression we have obtained from various parts of the ECO's original reasons for the decision is that the ECO has applied a general policy of requiring applicants to prove that their marriage is not one of convenience, and in this context treats EEA applications in the same way as ordinary immigration applications under the Rule… We would emphasise that EEA rights of entry are not exercises of discretion generally afforded to Member States to formulate rules for the admission of aliens, but the exercise of Treaty rights to be recognised by states subject to the substantive and procedural provisions for preventing abuse and fraud.'[75]

The extent of the burden on the applicant is to prove that he or she is a family member – i.e. by producing basic documents. This she had done and this represented the entirety of her obligations, unless the ECO could find some substantive reason to suggest that there might be a marriage of convenience (e.g. contracted shortly before the application was made; not living at the same address as the spouse, etc.) thus throwing the burden of proof back on the applicant. To help the UKBA for the future with its decision-making, the Tribunal reproduced in an Appendix to the determination the relevant parts of the Commission's guidance on abuse and fraud, making it clear that the burden of proof is on the state.[76] It has also introduced practices of judicial 'cross-sitting', either between different chambers of the Upper Tribunal, or with the Court of Appeal in relation to family cases,[77] in order to bring the necessary judicial expertise on board for particularly difficult cases.

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74 [2012] UKUT 00038 (IAC).

75 *Papajorgji*, paras. 21 and 22.

76 Part 4 of COM(2009) 313, above n.2. To the list of recent Upper Tribunal (IAC) cases clarifying the law one can also add *Sanade and others (British children – Zambrano – Dereci)* [2012] UKUT 00048 on the impact of *Ruiz Zambrano* on foreign national prisoner cases and *Barnett* 2012] UKUT 00142 [IAC] on issues of documentation.

77 *Nimako-Boateng (residence orders - Anton considered)* [2012] UKUT 00216 (IAC).

Finally, the Upper Tribunal has chosen to refer a number of cases to the CJEU, in order to help with the resolution of a number of outstanding issues with the CRD, e.g. regarding the obligation on Member States to provide for the 'facilitation' of the residence of 'other family members'[78] on the aggregation of periods of residence for the purposes of the right of permanent residence qualification, where there have also been periods of imprisonment,[79] and on the closely related question of the interaction between periods of imprisonment and the acquisition of the highest level of protection against deportation after ten years residence.[80] In that sense, the Upper Tribunal has now inserted itself firmly into a cross-EU conversation on the scope and character of EU free movement law. Once that conversation is in full swing, it may be there will be much more cross-fertilisation between EU law and UK law, including the possibility for the latter to influence the former as well as vice versa alone. While the possibilities of future cross-fertilisation of ideas and approaches may already be evident in a minority of the judgments of the UK tribunals and courts,[81] however, it seems that the point where this also enters administrative practice lies some way in the future.

Problems of practice and administrative culture

Many respondents shared concerns about whether there are sufficient resources going in to the system to make it work properly given the complexity of the rules to be applied. This is one of the issues, along with the question of training and whether decision-makers are applying the correct principles, which affect the quality of decision-making at all levels. An advisor respondent accepted that advisors themselves also need to be more aware of EU issues, now that these represent, in some areas of welfare work, up to 25% of the total case load [Q27]. The same respondent also commented that where decision-making in some areas – e.g. applying the right to reside test in order to determine entitlement to benefits – is decentralised, there are often problems:

> 'Because local authorities each have their own decision-making teams, and tend to be a law unto themselves, we do see certain patterns of rogue decision making. You'll get very odd decisions of the same nature springing up at local authorities at certain times, which seems to be they've got it into their heads that certain groups should be refused on this basis. Usually it's very wrong-headed thinking, but it's a long process to get that changed. If possible, we want to avoid going down appeal routes; it's time consuming for everybody and costly. Sometimes it can be effective that we just provide the advisor with the necessary references to the legislation or guidance…' [Q28]

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78 Case C-83/11 *SSHD* v. *Rahman*, pending, referred by the Upper Tribunal in *MR and others (EEA extended family members) Bangladesh* [2010] UKUT 449 (IAC).

79 Case C-378/12 *Onuekwere*, pending, referred by the Upper Tribunal in *Onuekwere (imprisonment – residence)* [2012] UKUT 00269 (IAC).

80 Case C-400/12 *MG*, pending, referred by the Upper Tribunal in *MG (EU deportation – Article 28(3) – imprisonment) Portugal* [2012] UKUT 00268 (IAC).

81 It is arguable there is some evidence of such cross-fertilisation in the approach to sham marriages in *R (on the application of Baiai and others)* v. *SSHD* [2008] UKHL 53, and in the approach of the courts to the issue of the family life rights of citizen children after the Supreme Court judgment in *ZH (Tanzania)* v. *SSHD* [2011] UKSC 4 and the CJEU judgment in Case C-34/09 *Ruiz Zambrano*, 8 March 2011 (e.g. *Sanade and others (British children – Zambrano – Dereci)* [2012] UKUT 00048).

Scottish respondents commented that there often seemed to be less familiarity with some of the key elements of EU free movement law, especially in the higher courts, in Scotland than in England, perhaps because there are fewer cases coming through the system. This can make the task of dealing with the relatively few cases that do come to trial even more challenging given the complex issues often raised.

Discussions of resources also led to some interesting speculations about the role of government officials in relation to free movement issues:

> 'Yes, there needs to be better resources. The irony is I quite regularly talk to people who work within the DWP whose job it is to encourage people to come to the UK from other EU countries. His job is actually to tell them that they have a right to come here, they have a right to claim benefits should their income be low or they're out of work. Yet, the DWP doesn't provide support for the decision makers who are making the decisions on those benefits.' [Q29]

Information about precisely how the UKBA works sometimes seemed scarce even for those who engage with it regularly, suggesting that flows of information could be improved. It was interesting to note that while the UKBA informed us that the casework division is based in the immigration section of the UKBA, even amongst practitioners dealing regularly with the UKBA this fact did not necessarily seem well known:

> 'The move of the European Directorate away from the immigration field to the nationality field within the structures of UKBA is very interesting because it really picks up again on this issue which I mentioned earlier about whether people are seen as co-citizens or as migrants. Obviously co-citizens, the rights based issue, the equality issues and everything else are going to be much more stronger, much more prevalent. Now that's only a recent development as far as I know. I'm not even sure how stable that arrangement is because there is so much change going on in UKBA so it might have been just a blip at one point but it's a matter that the EU Directorate moved up to Liverpool and was therefore within the nationality, sort of .. and managers who were used to dealing with nationality issues. So I think there is a change, well there has been a change but it doesn't fit in neatly anywhere because these are very big principles.' [Q33]

Some respondents expressed a fear that UKBA officials involved in policy-making relating to EEA cases are too heavily inculcated with a culture of immigration control because most of their previous careers have been spent in the latter area:

> 'and because they spent large parts of their career in immigration rather than EU, they've been working in immigration for 15, 20 years, it'd be very difficult for anyone with that background simply to say "we're still in the immigration department, still in UKBA but now I need to take an entirely different approach because people are accepted." Because people are conservative especially when they are going into something new that they're not necessarily massively familiar with, they've then got to pick it up and they just carry the baggage of where they've been.' [Q34]

However, the same respondent also accepted that caseworkers do not have the same level of career mobility and so should in principle have had longer to develop a deep expertise with EU law.

Two particular criticisms of the UKBA surfaced during the research. These were that it had a tendency to deploy certain arguments – typically restrictive of the rights of EEA claimants – before the UK courts with an awareness that these would be unlikely to hold were the case to reach the CJEU. The second concerned issues of delay in responding to new challenges posed by case law in the CJEU, exemplified in particular by the UKBA response to the *Metock* case.[82] As regards the first issue, the point is well explained by a practitioner respondent when asked about arguments that had been made by various barristers acting on behalf of the UKBA in cases before both the national and European courts:

> 'What lies behind [these arguments] is what lies behind any argument led by an advocate on behalf of a client. The argument is designed to promote the policy interests of the client in a way which has some prospect of success for them. What is perhaps interesting from your point of view is that often Counsel's opinion may well be, you are more likely than not to succeed in this argument in the domestic courts and when there's a reference you are very likely to lose this argument. The government is often quite content to litigate a case on that basis. If you like, "get away with it as long as they can" would be one way of putting it, or "continuing to assert their different view of the effect of freedom of movement rights in Europe for as long as they can".' [Q35]

With respect to the issue of delay, above and beyond the delays in routine decision-making where criticisms have been well documented in response to complaints brought against the UK before bodies such as the European Parliament petitions committee,[83] a particular issue was thought by many respondents to lie with the UKBA's delay in implementing the *Metock* judgment of the CJEU which required amendment of the EEA Regulations. This process took a considerable time, and meanwhile practitioner respondents felt that there was stagnation in the UKBA decision-making processes. For example, one respondent told us:

> 'So it was very difficult to get anything out of the Agency on *Metock* and it's an ongoing battle with the Agency...saying to the Agency "You have to have from day one, as we did, a working reaction to it and you are sending your presenting officers into court, into the tribunal without a clear steer as to what they should say. They are standing up in different courts saying different things. That's not their fault they're being left to make it up as they go along but you are one body you need to speak with one voice on this. ... There isn't anything you can do about it, you were wrong. This is the position; it's very clear what should apply". It was heel dragging...' [Q30]

Extrapolating more generally, the same respondent felt that the UKBA needed to do more to show that it would respond quickly to the exigencies of EU law:

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82 Case C-127/08 *Metock* [2008] ECR I-6241.

83 European Parliament Report on the EU Citizenship Report 2010, A7-0047/2012, p18.

> 'You must give your presenting officers in court something to say. Really they ought all to be saying the same thing because you're one department." It's an area where there is a very long way to go… That ability to extrapolate from the particular to the general which is part of the rule of law and understanding of precedent isn't there, it's not there.' [Q37]

In similar terms another practitioner respondent also highlighted the problem of 'delay' or 'drift' as a serious one within the system, highlighting what s/he saw as an unsatisfactory response to the challenge of change:

> 'I think where a court, whether it's a UK court or a European judgment like *Metock*, where it says 'no, you can't do this' then the default response of the Border Agency is to do nothing; to not make a policy for as long as possible and allow the decision making or the lack of decision making to drift until at some point somebody says 'well, we have to come up with a policy' or until they receive another court judgment which says 'you really have to come up with a policy or stop making these types of unlawful decisions.' Of their own volition, they're very resistant to that and I think the same factors are at play when we talk about EU citizenship law, *Zambrano*...' [Q38]

But as one practitioner commented, these sorts of challenges for the national administration are just part and parcel of an administrative justice system which in turn is embedded in a judicially controlled system such as that offered by EU law:

> 'Well that's what happens when administrations get controlled by judgments but that's part of the separation of powers and the application and interpretation of the law. For some reason they seem to find that difficult to grasp.' [Q33]

Yet this point may not be fully understood. One practitioner said that s/he felt that the niceties of the distinction between case law and statute law were not well understood through the UKBA and that

> 'The UK Border Agency struggles with precedent, that it has had a role in shaping [the law].... You're told you can't do this in one case so you don't do it in that case but you do it in another case and you have a go and that's just a little bit of a failure to understand the rule of law.' [Q41]

Concluding thoughts: are the two worlds drawing closer together?

In this concluding section, we draw together some of the specific issues that relate to the case study of EU free movement law in the UK, while at the same time highlighting the more general lessons to be derived from this type of research, in other fields of law and in respect of other Member States.

The findings of our research need to be placed in context. Since there is no evidence of complete administrative and judicial gridlock as a result of complaints made and claims brought, one must surmise that the vast majority of the UK's nearly 2 million non-national EU citizen residents are reasonably content with the enjoyment of their EU rights in the

UK.[84] Bar a smattering of well-publicized incidents,[85] the same can presumably be said of the much larger numbers of tourists and other visitors who come every year to the UK. But legal analysis and close attention to the work of the administrative and judicial systems, not to mention the evidence regarding complaints submitted to the EU institutions and via the Your Europe Advice line,[86] show that the situation is not completely satisfactory.

Information provided by the UKBA indicated that of the 73,373 EEA applications (e.g. for permanent residence, EEA family permits or specific decisions related to new Member State citizens) made in 2010 and 90,879 made in 2011, 82% were granted in 2010 and only 62% were granted in 2011.[87] 38% is a high refusal rate in circumstances where national authorities have little discretion in deciding whether to admit an application, and where the rules of eligibility are supposed to be reasonably clear. Inevitably a certain percentage of those refusals were appealed to the First Tier Tribunal and it was interesting to see that 39% of appeals succeeded in 2010 and 60% succeeded in 2011. The dates do not align entirely, but information provided by the HM Courts Service offered back up data confirming these trends by indicating that there were 7100 appeals in respect of EEA decisions received by the First Tier Tribunal between 1 April 2011 and 31 March 2012.[88] The Courts Service data indicated that during the same period 40% of appeals were allowed, 41% were refused, and the balance withdrawn or abandoned. In same period (and thus inevitably not referring to the same batch of cases), 670 appeals to the Upper Tribunal from the First Tier Tribunal were received, of which 40% were allowed.[89] This represents a substantial case load for the Tribunals, and reflects also why practitioners in several cases indicated that EEA cases now represent a considerable proportion of their ongoing immigration work. The success rate seems to be higher than that for UKBA decisions generally (27% for appeals against UKBA decisions given in 2010).[90]

The UK may not have been singled out alone for special treatment by the European Commission, which is making a much broader political effort to prioritize the enjoyment of EU citizenship rights and of the benefits of the single market right across the EU,[91] but the

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84 According to 2011 Eurostat figures (http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-11-034/EN/KS-SF-11-034-EN.PDF), of the UK's total population of around 62m persons, 7% or 4.36m were not UK citizens, and of these 3.1% of the population, or 1.92m persons, were citizens of other EU Member States.

85 'Diplomatic spat over Edinburgh pub's refusal to accept EU identity card', http://www.heraldscotland.com/news/home-news/diplomatic-spat-over-edinburgh-pubs-refusal-to-accept-eu-identity-card.17243655, 15 April 2012.

86 Your Europe Advice: http://ec.europa.eu/citizensrights/front_end/index_en.htm. Valcke, above n.8 draws on this source for his analysis.

87 Information (dated 4 September 2012) provided to the authors pursuant to an FOI request, and held on file.

88 Information (dated 21 August 2012) provided to the authors pursuant to an FOI request, and held on file.

89 This figure does not distinguish between appeals brought by the UKBA and appeals brought by the applicant.

90 Administrative Justice and Tribunals Council (AJTC) 2011 report *Right First Time*, June 2011, available from http://www.justice.gov.uk/ajtc/docs/AJTC_Right_first_time_web(7).pdf at 15.

91 E.g. EU Citizenship Report 2010: *Dismantling the obstacles to EU citizens' rights*, COM(2010) 603; European Commission Staff Working Paper, *The Single Market through the lens of the people: A snapshot of citizens' and businesses' 20 main concerns*, SEC(2011) 1003, August 16 2011; Proposal for

Commission has not hesitated to highlight the problems that it sees with the situation in the UK, with the infringement proceedings that it has brought in areas such as rights of residence and the position of new Member State citizens. The identification of these as areas of concern also reflect the published judgments of the Tribunal noted in this article and the balance of issues brought out by the interviews.[92] There may be an ongoing issue of political will in the UK related to the challenges posed by the EU free movement rules in an enlarged EU, especially because of the ubiquitous and almost invariably negative press coverage of what is universally termed 'East European immigration'.[93] But the reality is that the challenge posed by free movement is here to stay for so long as the UK is part of the EU.[94] As the pressure group *Open Europe* makes clear in a recent report,[95] opting out of free movement must necessarily involve leaving the EU. This may be a hard lesson for the UK – now so accustomed to its opt-outs and its special statuses – to learn, but it is the reality of the EU legal and constitutional order as it stands. The issue then is how to make the systems work better together. This raises important legal cultural questions, as this article has sought to show, which go well beyond the scope of 'law in the books'. And it also explains why, for example, the tribunal system has not always found EU law on free movement easy to apply correctly.

In our research, we found that in the 'colliding legal worlds' of EU free movement law and UK immigration law, adversarial relationships between some of the stakeholders have evolved, and these types of relationships do not make it any easier to overcome the dissonance evident in the respective understandings of the various legal rules which are applicable. The UKBA has found itself in recent years regularly admonished in the courts, especially in the Upper Tribunal (IAC), for its application of some aspects of the free movement rules, especially those concerned with third country national family members. The UKBA has failed in its attempts to impose its conception of the 'spirit' of the EU free movement rules as a guide to the limits that should and do apply to the enjoyment of free movement rights, as in a rights-based system only a case of fraud or abuse of rights proven by the national authorities can displace the rights in question,[96] unless there is a case for applying reasons of public interest within the limited domain that this is now possible after the CRD, especially to long term residents. Defaulting back to a position of 'immigration control' is not a long term successful strategy for the UKBA in its management of the EU free movement rules, and although this is not what it publicly states that it is doing, it is none the

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a Decision of the European Parliament and of the Council on the European Year of Citizens (2013), COM(2011) 489.

92 See in particular IP/11/981; IP/12/417 above n.5.

93 A Google search on "East European immigration" disclosed more than 38,000 items on the internet, the vast majority of which are items concerned with the free movement of citizens of the EU from states which joined the EU in 2004 and 2007 (with a small smattering of historical articles about immigration, especially of the Jews of Eastern Europe to the United States).

94 After flirting with the possibility of finding some basis for continuing the transitional restrictions, in November 2012 the UK Government confirmed that it was lifting the transitional measures on Bulgarian and Romanians which have restricted their access to the labour market, as scheduled by the Accession Treaty: 'UK will not extend Romania and Bulgaria migrant curbs, http://www.bbc.co.uk/news/uk-politics-20287061, 11 November 2012.

95 See Open Europe, *Tread carefully: The impact and management of EU free movement and immigration policy*, March 2012, http://www.openeurope.org.uk/Content/Documents/Pdfs/EUimmigration2012.pdf.

96 Article 35 CRD; see *Papajorgji* above n.74.

less what it is widely perceived to be doing, not least because decision-making in the area of free movement seems to be bedeviled by the same gremlins of delay as exist in 'mainstream' immigration and, in some cases, the outcomes seem to be rather capricious. Certainly, the successful appeal figures cited above seem to indicate errors of law or unreasonable judgments are being made by decision-makers.

It is interesting to note, in that context, the report of the Administrative Justice and Tribunals Council (AJTC) of 2011 entitled *Right First Time*. In this Report, [97] the AJTC has emphasised the importance of getting administrative decisions 'right first time'. For this to happen, it is important for administrative authorities to publish clear guidance. The Report also provided a useful checklist of principles that should guide all decision-making in the administrative sphere,[98] and these have a resonance beyond the boundaries of free movement law and beyond the UK. The main principles are these: it is vital for administrators make a decision or to deliver a service to the user fairly, quickly, accurately and effectively; they must take into account the relevant and sufficient evidence and circumstances of a particular case; they must involve the user and keep the user updated and informed during the process; they must communicate and explain the decision or action to the user in a clear and understandable way, and inform them about their rights in relation to complaints, reviews, appeals or alternative dispute resolution; they must learn from feedback or complaints about the service or appeals against decisions; and finally administrators should empower and support staff through providing high quality guidance, training and mentoring.

But unfortunately, as just one relatively minor segment of a component of the UK executive that has faced unprecedented criticism in recent years, to the extent that it was described as 'not fit for purpose' in 2006,[99] those parts of the UKBA responsible for the implementation of the EU free movement rules seem to escape attention most of the time and certainly cannot be guaranteed to have taken notice of the principles sketched out by the AJCT. The delivery of EEA decisions is not mentioned in the UKBA business plans,[100] and EU related matters have been ignored in the successive Home Affairs Select Committee reports that have castigated the UKBA for its actual and perceived failings.[101] The EU Select Committee of the House of Lords has also not turned its attention to these issues in recent years, and would be likely to do so again only if the EU institutions were to propose new or significant amending measures in this field, as it sees its remit as scrutiny, not accountability. NGOs often highlight the monocular approach to accountability taken by bodies such as the Home Affairs Select Committee, which seem to view the UKBA as being accountable only for the

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97 *Getting it Right First Time* above n.90. See also Response of the AJCT to the paper 'Family Migration – A Consultation', 6 October 2011, available from http://ajtc.justice.gov.uk/docs/ajtc_family_migration_consultation_final_response_(2).pdf where it repeated the same point.

98 *Getting it Right First Time* above n.90 at 4.

99 'Immigration system unfit – Reid', http://news.bbc.co.uk/1/hi/uk_politics/5007148.stm, BBC News, 23 May 2006.

100 UKBA Business Plan, April 2011-March 2015, available to download from http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/uk-border-agency-business-plan/.

101 See most recently *Work of the UK Border Agency (August–December 2011)*, Twenty-first Report of Session 2010–12, 11 April 2012, HC 1722.

control aspects of immigration, and not also for those aspects which raise human rights or ethical concerns,[102] but they rarely point out that UKBA accountability in relation to its duties under the EU free movement rules seems completely absent.[103] In a quasi-federal system such as the EU, of course, the difficult question arises of *which* parliament the UKBA should be primarily responsible to in respect of its 'European' functions – national or European. At present, it seems to be neither, either because the mechanisms of accountability are absent (e.g. the European Parliament) or because there is no will to seek accountability (UK Parliament). And for EU citizens looking at how the UK Parliament works, examining the UKBA website or – most unlikely – perusing the EEA Regulations themselves, it is hard to discern exactly how the principles of EU free movement law fit into the increasingly politicized landscape of UK immigration law and policy.

It seems unlikely that the types of legal cultural dissonance which we have found negatively to affect the intersection of the EU free movement rules and UK immigration law will be fully overcome until there is greater visibility, improved levels of information, and increased accountability in respect of this crucial building block of the EU, its single market and the wider integration project. This is a lesson that is as important in other Member States where there are difficulties relating to the implementation of free movement rules as it is in the UK. Yet it is possible that a more positive trend can be fostered if the administration were to heed the suggestions of reports such as *Right First Time* and also if the intensive conversation which the Upper Tribunal has now entered into with the Court of Justice as a result of referring questions on some of the trickiest aspects of Directive 2004/38 were to bear eventual fruit in terms of more informed decision-making within the UKBA as a result of clarifications emanating from the CJEU. This would suggest that the multilevel system envisaged by the treaties and the legislation was in fact functioning well, and that residual problems should be seen primarily as domestic concerns, not EU-systemic ones. The fact is, however, that it has taken 40 years of UK membership to get to this point, suggesting that the problems are indeed bigger than just the failings of the domestic administration or courts system.

In sum, then, we can conclude that the resources exist – between the UK and the EU systems – for the problems identified and discussed in this article to be resolved. By presenting a mix of legal analysis and empirical evidence about how stakeholders understand and negotiate the problems of misfit between the EU and UK systems, we have sought to offer a richer description and narrative regarding the friction and overlap between EU free movement law and UK immigration law. It is important to emphasise the point that this is not just an issue of regarding the implementation of EU free movement law in the UK (i.e. this is not about studying compliance or implementation alone) but also regarding the continuing impact of the *context* in which implementation. This will differ from Member State to Member State. Only this will offer a full understanding of how the systems interact

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[102] N. Sigona, 'Is the UKBA 'not fit for purpose'? What purpose exactly?', JCWI Blog, 12 April 2012, http://jcwi.org.uk/blog/2012/04/12/ukba-%E2%80%98not-fit-purpose%E2%80%99-what-purpose-exactly.

[103] Few NGOs in the UK work directly on how immigration law and the EU free movement rules intersect. The exceptions are the AIRE Centre (http://www.airecentre.org/), which is funded partly by the European Commission to undertake this type of advice work, and also does a limited amount of advocacy, and the Migrants' Rights Network (http://www.migrantsrights.org.uk/), which is focused primarily on advocacy.

and *whether* and *how* these interactions can be understood as colliding legal worlds, even if some of these collisions seem somewhat mundane in respect of the controversies they incite.

Each case – sector of EU law/impact of national context – risks, of course, being specific and particularistic in character, with no scope for broader reflections or the development of a set of tools of analysis that can be applied more generally. Even so, we would argue that more general insights for research approaches can be drawn from this article. First and foremost is the claim that combining legal analysis with insights drawn from interviews with stakeholders provides insights into how EU law and national law mesh together (or not, as the case may be) at a higher level of granularity than is possible with legal analysis alone and away from the linear thinking of implementation as a process to be downloaded by the EU onto the national 'subject'. This approach may not provide a gaps or compatibility analysis which is ordered by the systematic categories of legal scholarship, but it does provide a fuller picture of how the situation operates 'at street level'. On the other hand, while focusing on the particular legal cultural issues, it starts to provide some reference points, which can be applied transnationally and cross-culturally, such as ideas of decision-making 'mindset', the 'leakage' of one system into another, and even the idea of 'friction' between the systems. To be used for comparative analysis, of course, they would require much more precise specification and perhaps sharper theoretical framing in a social science context. However, at this stage what we seek to offer is a mapping of the landscape of these colliding legal worlds, rather than precise guidance as whether these collisions are to be found wherever EU law engages with national law, whether they can in future be avoided, or whether they can be limited in their effects.